

ASSEMBLY BILL

No. 856

Introduced by Assembly Member Calderon

February 26, 2015

An act to amend Section 1708.8 of the Civil Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 856, as introduced, Calderon. Invasion of privacy.

Under existing law, except as specified, a person is liable for physical invasion of privacy when that person knowingly enters onto the land of another person without permission or otherwise trespasses to capture any type of visual image, sound recording, or other physical impression of a person engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. Under existing law, a person is liable for constructive invasion of privacy for the same activity, as specified, through the use of any device, regardless of whether there is a physical trespass. Existing law subjects a person who commits physical or constructive invasion of privacy to specified damages and civil fines.

This bill would expand liability for physical invasion of privacy to additionally include a person knowingly entering into the airspace of another person without permission, as provided.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1708.8 of the Civil Code is amended to
2 read:

1 1708.8. (a) A person is liable for physical invasion of privacy
2 when the defendant knowingly enters onto the land *or into the*
3 *airspace* of another person without permission or otherwise
4 committed a trespass in order to capture any type of visual image,
5 sound recording, or other physical impression of the plaintiff
6 engaging in a private, personal, or familial activity and the invasion
7 occurs in a manner that is offensive to a reasonable person.

8 (b) A person is liable for constructive invasion of privacy when
9 the defendant attempts to capture, in a manner that is offensive to
10 a reasonable person, any type of visual image, sound recording,
11 or other physical impression of the plaintiff engaging in a private,
12 personal, or familial activity, through the use of any device,
13 regardless of whether there is a physical trespass, if this image,
14 sound recording, or other physical impression could not have been
15 achieved without a trespass unless the device was used.

16 (c) An assault or false imprisonment committed with the intent
17 to capture any type of visual image, sound recording, or other
18 physical impression of the plaintiff is subject to subdivisions (d),
19 (e), and (h).

20 (d) A person who commits any act described in subdivision (a),
21 (b), or (c) is liable for up to three times the amount of any general
22 and special damages that are proximately caused by the violation
23 of this section. This person may also be liable for punitive damages,
24 subject to proof according to Section 3294. If the plaintiff proves
25 that the invasion of privacy was committed for a commercial
26 purpose, the defendant shall also be subject to disgorgement to the
27 plaintiff of any proceeds or other consideration obtained as a result
28 of the violation of this section. A person who comes within the
29 description of this subdivision is also subject to a civil fine of not
30 less than five thousand dollars (\$5,000) and not more than fifty
31 thousand dollars (\$50,000).

32 (e) A person who directs, solicits, actually induces, or actually
33 causes another person, regardless of whether there is an
34 employer-employee relationship, to violate any provision of
35 subdivision (a), (b), or (c) is liable for any general, special, and
36 consequential damages resulting from each said violation. In
37 addition, the person that directs, solicits, actually induces, or
38 actually causes another person, regardless of whether there is an
39 employer-employee relationship, to violate this section shall be
40 liable for punitive damages to the extent that an employer would

1 be subject to punitive damages pursuant to subdivision (b) of
2 Section 3294. A person who comes within the description of this
3 subdivision is also subject to a civil fine of not less than five
4 thousand dollars (\$5,000) and not more than fifty thousand dollars
5 (\$50,000).

6 (f) (1) The transmission, publication, broadcast, sale, offer for
7 sale, or other use of any visual image, sound recording, or other
8 physical impression that was taken or captured in violation of
9 subdivision (a), (b), or (c) shall not constitute a violation of this
10 section unless the person, in the first transaction following the
11 taking or capture of the visual image, sound recording, or other
12 physical impression, publicly transmitted, published, broadcast,
13 sold, or offered for sale the visual image, sound recording, or other
14 physical impression with actual knowledge that it was taken or
15 captured in violation of subdivision (a), (b), or (c), and provided
16 compensation, consideration, or remuneration, monetary or
17 otherwise, for the rights to the unlawfully obtained visual image,
18 sound recording, or other physical impression.

19 (2) For the purposes of paragraph (1), “actual knowledge” means
20 actual awareness, understanding, and recognition, obtained prior
21 to the time at which the person purchased or acquired the visual
22 image, sound recording, or other physical impression, that the
23 visual image, sound recording, or other physical impression was
24 taken or captured in violation of subdivision (a), (b), or (c). The
25 plaintiff shall establish actual knowledge by clear and convincing
26 evidence.

27 (3) Any person that publicly transmits, publishes, broadcasts,
28 sells, or offers for sale, in any form, medium, format, or work, a
29 visual image, sound recording, or other physical impression that
30 was previously publicly transmitted, published, broadcast, sold,
31 or offered for sale by another person, is exempt from liability under
32 this section.

33 (4) If a person’s first public transmission, publication, broadcast,
34 or sale or offer for sale of a visual image, sound recording, or other
35 physical impression that was taken or captured in violation of
36 subdivision (a), (b), or (c) does not constitute a violation of this
37 section, that person’s subsequent public transmission, publication,
38 broadcast, sale, or offer for sale, in any form, medium, format, or
39 work, of the visual image, sound recording, or other physical
40 impression, does not constitute a violation of this section.

1 (5) This section applies only to a visual image, sound recording,
2 or other physical impression that is captured or taken in California
3 in violation of subdivision (a), (b), or (c) after January 1, 2010,
4 and shall not apply to any visual image, sound recording, or other
5 physical impression taken or captured outside of California.

6 (6) Nothing in this subdivision shall be construed to impair or
7 limit a special motion to strike pursuant to Section 425.16, 425.17,
8 or 425.18 of the Code of Civil Procedure.

9 (7) This section shall not be construed to limit all other rights
10 or remedies of the plaintiff in law or equity, including, but not
11 limited to, the publication of private facts.

12 (g) This section shall not be construed to impair or limit any
13 otherwise lawful activities of law enforcement personnel or
14 employees of governmental agencies or other entities, either public
15 or private who, in the course and scope of their employment, and
16 supported by an articulable suspicion, attempt to capture any type
17 of visual image, sound recording, or other physical impression of
18 a person during an investigation, surveillance, or monitoring of
19 any conduct to obtain evidence of suspected illegal activity or
20 other misconduct, the suspected violation of any administrative
21 rule or regulation, a suspected fraudulent conduct, or any activity
22 involving a violation of law or business practices or conduct of
23 public officials adversely affecting the public welfare, health, or
24 safety.

25 (h) In any action pursuant to this section, the court may grant
26 equitable relief, including, but not limited to, an injunction and
27 restraining order against further violations of subdivision (a), (b),
28 or (c).

29 (i) The rights and remedies provided in this section are
30 cumulative and in addition to any other rights and remedies
31 provided by law.

32 (j) It is not a defense to a violation of this section that no image,
33 recording, or physical impression was captured or sold.

34 (k) For the purposes of this section, “for a commercial purpose”
35 means any act done with the expectation of a sale, financial gain,
36 or other consideration. A visual image, sound recording, or other
37 physical impression shall not be found to have been, or intended
38 to have been, captured for a commercial purpose unless it is
39 intended to be, or was in fact, sold, published, or transmitted.

1 (l) (1) For the purposes of this section, “private, personal, and
2 familial activity” includes, but is not limited to:

3 (A) Intimate details of the plaintiff’s personal life under
4 circumstances in which the plaintiff has a reasonable expectation
5 of privacy.

6 (B) Interaction with the plaintiff’s family or significant others
7 under circumstances in which the plaintiff has a reasonable
8 expectation of privacy.

9 (C) If and only after the defendant has been convicted of
10 violating Section 626.8 of the Penal Code, any activity that occurs
11 when minors are present at any location set forth in subdivision
12 (a) of Section 626.8 of the Penal Code.

13 (D) Any activity that occurs on a residential property under
14 circumstances in which the plaintiff has a reasonable expectation
15 of privacy.

16 (E) Other aspects of the plaintiff’s private affairs or concerns
17 under circumstances in which the plaintiff has a reasonable
18 expectation of privacy.

19 (2) “Private, personal, and familial activity” does not include
20 illegal or otherwise criminal activity as delineated in subdivision
21 (g). However, “private, personal, and familial activity” shall include
22 the activities of victims of crime in circumstances under which
23 subdivision (a), (b), or (c) would apply.

24 (m) (1) A proceeding to recover the civil fines specified in
25 subdivision (d) or (e) may be brought in any court of competent
26 jurisdiction by a county counsel or city attorney.

27 (2) Fines collected pursuant to this subdivision shall be allocated,
28 as follows:

29 (A) One-half shall be allocated to the prosecuting agency.

30 (B) One-half shall be deposited in the Arts and Entertainment
31 Fund, which is hereby created in the State Treasury.

32 (3) Funds in the Arts and Entertainment Fund created pursuant
33 to paragraph (2) may be expended by the California Arts Council,
34 upon appropriation by the Legislature, to issue grants pursuant to
35 the Dixon-Zenovich-Maddy California Arts Act of 1975 (Chapter
36 9 (commencing with Section 8750) of Division 1 of Title 2 of the
37 Government Code).

38 (4) The rights and remedies provided in this subdivision are
39 cumulative and in addition to any other rights and remedies
40 provided by law.

- 1 (n) The provisions of this section are severable. If any provision
- 2 of this section or its application is held invalid, that invalidity shall
- 3 not affect other provisions or applications that can be given effect
- 4 without the invalid provision or application.